



# WILLPOWER PLUS

## Deed of Mutual Wills



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6/11, 2016 edn



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## Deed of Mutual Wills

### 1. *Why have these documents become popular?*



The earliest reported case concerning a deed of mutual wills ("DMW") is found in 1769. So their resurgence in popularity in the last decade is another example of "Everything old is new again".

The resurgence is probably due to two things. Firstly, there is an increasing percentage of blended families in society, and therefore an increasing need to adequately cater for the legitimate interests of all members of that family.

Secondly, the decision of the NSW Supreme Court, and then the Court of Appeal, in *Baird -v- Smee* highlighted the inadequacy (especially in the situation of a blended family) of the common arrangement whereby one partner agrees to leave everything to the other partner on the understanding that the surviving partner will, on his or her death, leave part of the estate to the children of the first to die.

That type of arrangement was made in *Baird -v- Smee*, but the courts held that there was nothing which legally impeded the survivor making another will, after the death of the first, excluding the children of the first to die.

The courts have decided that, before the survivor can be prevented from excluding the intended beneficiaries of the first to die, there

needs to be a contract that the survivor will not change his/her will in favour of those beneficiaries if he/she is the survivor. *For more information see "Trials and Tribulations" newsletter vol18 no.4*

Essentially a DMW is a contract to make, and then not revoke, a will (or, most usually, a part of a will).

### 2. *What is a mutual will within the context of a DMW?*

Strictly, mutual wills are wills that are identical except for key provisions (such as the appointment of executor and gifts to beneficiaries) which are reversed. For example, if W leaves her estate to H, the mutual will of H leaves everything to W.

However, wills covered by a DMW will not always be strictly mutual wills; it is not unusual for each will to be, at least, slightly different. The important requirement for a DMW is not having a mutual will in the strict sense but in making a legally binding obligation to not change the agreed will, or the key parts of it.



### 3. *Is it useful even without a blended family?*

Yes. A blended family is one where one (or both) partner(s) has a child by someone other than the

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other partner. This situation is a reason for many DMWs that are now made.

Historically, DMWs were used within 'conventional' families to ensure that an agreed inheritance was carried out. Together with the uses mentioned at 6 below, establishing a definite inheritance regime remains a reason for a DMW today.

## 4. *Can a DMW guarantee a planned inheritance?*

There are very few certainties apart from death. So, whilst the answer is no, that should not deter making a DMW as in many circumstances it will ensure a planned inheritance. There are three main issues:

4.1 A family provision claim is a claim made by an eligible person - usually a close relative - seeking a share, or a greater share, of the deceased's estate. *For more information see "Challenging a Deceased's Estate" InfoSheet.* Does a DMW defeat such a claim?

A Queensland decision suggests that it's a considerable help. In NSW three things are clear: firstly, a DMW is an important part of proper estate planning.



Secondly, proper estate planning can lessen, and perhaps even remove, the impact of a family

provision claim. Thirdly, the addition of intended beneficiaries as parties to the Deed provides even better protection against a challenge to the arrangement contained in the DMW.

4.2 We are usually free to dispose of our assets as we want, during our lifetimes. So, can the surviving spouse, for instance, dispose of her/his assets to avoid the effect of a DMW?



The answer depends upon the contents of the DMW. The standard type of DMW does not prevent a testator disposing of his/her assets during his or her lifetime.

However, it is possible for the parties to a DMW to contract that their assets, or at least certain identified assets, cannot be disposed of during the parties' lifetimes. This ensures that an asset is preserved so that it is disposed of in the agreed will (so far as the law can do so).

4.3 The easy part of a DMW is recording the obligation of H to leave a will benefiting W, specifying that W benefit H's children, and stating that W can't revoke the will. The hard part of a DMW is working out the appropriate exceptions where the parties are no longer bound by those obligations. For example:

4.3.1 What if the other party agrees to the change to the will?

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4.3.2 What if the parties separate other than due to illness or death, whilst each retains testamentary capacity?

4.3.3 What if one notifies the other that he/she intends to change the will?

What these examples show (and there are many other similar instances) is that it is important for the DMW to be prepared carefully, and designed for the circumstances of each particular client: One size doesn't fit all.

## 5. *Why isn't it just a matter of trust?*

It is common for partners to trust the other to do 'the right thing'. Unfortunately, from a legal perspective, that is no guarantee.



There are various reasons. Firstly, the surviving party's re-marriage usually revokes that spouse's previous wills. Secondly, even without a marriage, a new partner can make a family provision claim.

Thirdly, if there isn't a will the inheritance is even more problematic as intestacy operates rather randomly, and doesn't favour persons not related in any way by blood (such as the children of a partner from a previous relationship). *For more information see Q7 "What difference does a will make?" in "Estates" InfoSheet.*

Fourthly, it's a common experience that as we get older, and possibly more vulnerable, we

become more impressed by acts of relatively minor kindness. Fifthly, there are instances of the elderly being 'manipulated' by the unscrupulous. Sixthly, families can exercise persuasion to convince a testator that he/she should favour them over non-relatives.

For all these reasons, and there are no doubt others, 'trust' is not enough, and making a DMW doesn't evince a lack of trust. What making a DMW does is create a greater degree of certainty.

## 6. *Apart from the blended family and the traditional role of ensuring an inheritance, when can a DMW be used?*

Apart from a stand alone document, a DMW can be used in conjunction with other documents. For instance, it can be used:

- 6.1 As part of a comprehensive succession plan in a partnership agreement;
- 6.2 As part of a cohabitation agreement or binding financial arrangement, to ensure that there is an agreed sharing of assets in the event of both a voluntary separation and an involuntary separation (i.e. upon the death of one of the parties);
- 6.3 As part of a business deal, for instance if some obligation is to continue after death. *For more information see the "Deed of Mutual Wills" part of the paper I prepared for a legal conference in 2009 titled "More Practical Issues in Estate Planning".*



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